SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. ~~693~~ 29

B. CLIFTON WATSON, ET UX,
Appellants,

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT AS TO JURISDICTION

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IN THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No 14316

B. CLIFTON WATSON, ET UX,

Appellants,

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD., ET AL.,

Appellees

JURISDICTIONAL STATEMENT

Statutory Provisions Sustaining Jurisdiction

The jurisdiction of the Supreme Court of the United States upon appeal is invoked under Title 28, U. S. Code, Paragraph 1254 (2), as revised by the Act of June 25, 1948.

Date of Judgment and Application for Appeal

The final judgment of the Court of Appeals for the Fifth Circuit was entered February 27, 1953, sub nom. B. Clinton Watson, et ux vs. Employers Liability Assurance Corporation, Ltd., et al.

Application for appeal is herewith presented on the 7th day of March, 1953.

Louisiana Statute Validity of Which Is Involved

The statute of the State of Louisiana, the validity of which is involved, is the Louisiana law relating to a direct action against the liability insurer of a tort-feasor, who

commits a tort in Louisiana, irrespective of where the policy of liability insurance may have been written or delivered to the assured, which statutes are Acts 541 and 542 of the Louisiana Legislature for the year 1950.

In this cause Employers Liability Assurance Corporation, Ltd., wrote a policy of public liability insurance for and on behalf of The Gillette Company, the tort-feasor, which is a Delaware Corporation. The policy was written in the State of Massachusetts and delivered to the assured tort-feasor, in the State of Illinois. The appellants-plaintiffs were damaged by The Gillette Company in Bienville Parish, Louisiana, on or about the 9th of November, 1951, by negligence of The Gillette Company both of commission and omission. The said liability policy insured the said Gillette Company against liability for this specific negligence in the State of Louisiana although the policy contained what is known as a "no action" clause providing that no person injured through negligence of the assured might maintain an action on the policy until and unless judgment was first rendered against the assured or upon written agreement between the injured party, the assured, and the insurance company.

Inasmuch as the opinion of the Court of Appeals held the Louisiana Statutes to be invalid and unconstitutional on the broad ground that they violated "the defendant's constitutional rights" without specifying what constitutional rights were violated, we summarize the Louisiana laws as follows:

Section 1 of Act 541 of 1950 re-enacts Section 655 of Title 22 of the Louisiana revised statutes of 1950, provides that no policy or contract of insurance shall be issued or delivered in the State of Louisiana unless the policy provides that the bankruptcy of the insured shall not release the insurer; that the injured person shall have a right of direct

action against the insurer within the terms and limits of the policy within the State of Louisiana and that this right of direct action shall exist whether or not the policy was written or delivered in Louisiana and whether or not the policy contains provisions forbidding such direct action, providing only the accident or injury occurs within the State of Louisiana and further providing all provisions of the policy not in conflict with the laws of Louisiana shall not be affected. Act 542 of 1950 amends Section 983 of Title 22 of the revised statutes of Louisiana by adding a provision that no certificate of authority to do business in Louisiana shall be issued to a foreign liability insurer until that insurer shall consent to be sued directly as provided in Act 541, whether the policy of insurance sued upon was written in Louisiana or not, and whether or not the policy contains a provision forbidding such direct action, provided that the accident or injury occurs within the State of Louisiana, and further providing such foreign insurer shall deliver to the Secretary of State of Louisiana a consent in writing to such suits as a condition precedent to obtaining a certificate of authority to do business in Louisiana.

Nature of the Case and Rulings of the Court

The case arose on complaint of B. Clinton Watson and his wife, Mrs. Ruth S. Watson, which was filed in the 2d Judicial District Court of the State of Louisiana in and for the Parish of Bienville, Louisiana, on April 5, 1952, seeking judgment for damages against Employers Liability Assurance Corporation, Ltd., as liability insurer of the Gillette Safety Razor Company, because of certain personal injuries inflicted upon Mrs. Watson through the use of a product manufactured and sold by the Gillette Safety Razor Company known as a "Toni Home Permanent". The complaint alleged harmful ingredients in the product, resulting

in injury to Mrs. Watson and further pleaded res ipsa loquitur. The defendant removed the case, because of diversity of citizenship, to the United States District Court for the Western District of Louisiana, Shreveport Division, on April 16, 1952. Thereupon the plaintiffs filed an amended complaint in the United States District Court to implead the Gillette Safety Razor Company as an additional defendant. That portion of the case however, that is, the portion involving the Gillette Safety Razor Company as a defendant, is not involved in this appeal.

Defendant Employers Liability Assurance Corporation, Ltd., appeared generally and moved to dismiss for the alleged reasons that Acts 541 and 542 of the Louisiana Statutes for 1950 were and are unconstitutional in that they would violate Section 1, Article 4 and Section 10, Article I and the 14th Amendment of the Constitution of the United States, in that such statutes would:

> (a) Impair the obligations of defendant's contract with its assured;
>
> (b) Deny to defendant its right to have full faith and credit given to the Legislative Acts and Jurisprudence of the States of Massachusetts and Illinois, in both of which states a "no action" clause in an insurance policy is valid;
>
> (c) Deprive the defendant of its property and rights without due process of law; and
>
> (d) Deny to defendant the equal protection of the law.

It is and was conceded that the policy was issued by Employers Liability Assurance Corporation, Ltd., to Gillette on or about July 1, 1951; that the policy was written in Massachusetts and delivered in Illinois; that it afforded protection to its assured in all forty-eight states of the union, including Louisiana and covered any accident occurring or liability arising in Louisiana; that Employers Liability As-

surance Corporation, Ltd., had complied with Act 542 of 1950 of the Statutes of Louisiana and have filed with the Secretary of State of Louisiana its consent to be sued directly in Louisiana on any policy issued by it, wherever issued, as to accidents occurring in Louisiana; that Acts 541 and 542 of 1950 went into effect and became the law of Louisiana on July 30, 1950, and that Employers Liability Assurance Corporation, Ltd., had complied therewith and was doing business in Louisiana for many months prior to the issuance of the policy involved in this case and prior to the accident and injury to Mr. and Mrs. Watson.

The District Judge granted Employers Liability Assurance Corporation, Ltd.'s motion and dismissed the complaint, rendering an opinion holding that the Statutes were unconstitutional, as depriving defendant of its property without due process of law for reasons set forth by the District Court in its opinion in the case of *Bish* v. *Employers Liability Assurance Corporation, Ltd.*, 102 Fed. Supp. 343.

The Court of Appeals affirmed the judgment of District Court in an opinion, copy of which is appended. The decision of the Court of Appeals expressly approved the reasoning and holding of the District Judge without elaborating upon that holding.

Substantial Questions Are Involved

The case was decided solely on the question of the constitutionality vel non of the Louisiana Statutes heretofore referred to and solely on the question of whether these Statutes were constitutional enactments of the State of Louisiana. Both the District Court and the Court of Appeals held the Statutes violated the United States Constitution and were therefore null, void and no effect as to any policy of liability insurance either written or delivered outside the State of Louisiana even though the policy afforded

protection of and covered accidents or liability arising in the State of Louisiana. The Supreme Court of the United States has not heretofore decided this question. The State of Louisiana has a sovereign interest in regulating insurance companies doing business within its borders and a great interest to protect parties who might be injured in Louisiana through the negligence of an assured operating or doing business in Louisiana, whenever that assured may have obtained his policy of insurance. The Supreme Court of the United States has never had presented to it or decided a question of this sort as to whether the State, in the exercise of its police powers, may constitutionally enact statutes of the sort here involved.

The conflicts of law question involved in the case is governed by the decision of the Supreme Court in *Klaxon Company* v. *Stentor Electric Manufacturing Company*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477. The Louisiana Court of Appeal, 2d Cir., in *Churchman* v. *Ingram*, 56 So. 2d 297, 1951 (writ of certiorari was denied by the Supreme Court of Louisiana) construed the statutes involved, and it is the only decision by a Louisiana Court passing upon these statutes. There the statutes involved here were held to be procedural. The Court of Appeals in the present case refused to follow this characterization but instead classified the statutes as substantive and then, upon this holding, determined that the Statutes were unconstitutional.

Even if the Court of Appeals is correct in adopting its own classification of these Statutes, it erred in not following the rationale of *Hoopeston Canning Company* v. *Cullen*, 318 U. S. 313, 87 L. Ed. 777. The Court of Appeals did not consider in any respect the degree of interest that the State of Louisiana has in the subject matter of the attacked legislation nor would it consider the reasonableness of the legislation. It approached the matter as though it were purely

one of conflicts of law dealing with contracts and brushed aside without comment the proposition that the police powers of the State might be sufficient to overwhelm any constitutional objections made on other grounds.

Cases Sustaining Jurisdiction

Cases believed to sustain the jurisdiction of the Supreme Court of the United States in appeals from a Court of Appeals where that court has held a state statute to be invalid as repugnant to the Constitution of the United States are *McCarol* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 60 S. Ct. 504, 84 L. Ed. 683; *New State Ice Company* v. *Liebmann*, 285 U. S. 262, 52 S. Ct. 371, 76 L. Ed. 747; *People of the State of New York* v. *Latrobe*, 279 U. S. 421, 49 S. Ct. 377, 73 L. Ed. 776; *Republic Pictures Corporation* v. *Kappler*, 327 U. S. 757, 66 S. Ct. 523, 90 L. Ed. 991; *Keating* v. *Public National Bank*, 284 U. S. 587, 52 S. Ct. 137, 76 L. Ed. 507; and *City of Richmond* v. *Deans*, 281 U. S. 704, 50 S. Ct. 407, 74 L. Ed. 1128.

While the above cases were decided under Section 240 of the Judicial Code (Title 28, U. S. Code, 1946, Paragraph 347) before its recent revision, the present section as revised by the Act of June 25, 1948 (Title 28, U. S. Code, Paragraph 1254 (2)), is substantially identical. See revisers notes to revised section 1254.

Alternate Certiorari Application

Appellants are also applying for certiorari with respect to the same judgment. They believe that the Supreme Court of the United States has jurisdiction over this appeal. If, however, in this they be mistaken, it is requested that writ of certiorari be granted. *Bradford Elec-*

tric Light Company v. *Clapper*, 284 U. S. 221, 52 S. Ct. 118, 76 L. Ed. 254.

Respectfully submitted,

(Signed) VAL. IRION
RICHARD H. SWITZER,
CLEVE BURTON,
Attorneys for Appellants.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14316

B. CLIFTON WATSON, ET UX, *Appellants,*

versus

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LIMITED, ET AL., *Appellees.*

Appeal from the United States District Court for the Western District of Louisiana.

(February 27, 1953.)

Before HUTCHESON, Chief Judge, and STURM and RIVES, Circuit Judges.

HUTCHESON, Chief Judge: This is the latest to be decided in a series of five tort actions[1] brought in the Western District of Louisiana against insurers under the Louisiana Direct Action Statutes.[2]

Originally filed in the state court against appellee, the liability insurer of Gillette Safety Razor Company, under a policy[3] containing a "no action" clause valid in Massachusetts, where the policy was written, and in Illinois, where it was delivered, the suit was for damages sustained by plaintiff as a result of using "A New Toni Home Permanent" alleged to be a product manufactured and sold by a department of Gillette Safety Razor Co., the insured.

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[1] Bayard v. Traders & General, 99 Fed. Supp. 343, decided 8-18-51; Bish v. Employers, 102 Fed. Supp. 343, decided 1-28-52; Mobley v. K. C. Southern, et al., (unreported) decided 3-22-52; Mayo v. Zurich, 106 Fed. Supp. 580, decided 8-16-52; Watson v. Employers, 107 Fed. Supp. 494, decided 9-15-52.

[2] Acts 541 and 542 of 1950 of the State of Louisiana.

[3] Identical as to insurers and insured and otherwise, except as to dates, with, indeed a renewal of the policy in the Bish case, reported below, 102 Fed. Supp. 344.

The claim was that plaintiff, Mrs. Watson, though she had used the product precisely as directed, had been seriously and permanently injured as a result of so using it, and that defendant, Employers Liability Assurance Corporation, having issued a policy of liability insurance insuring and protecting its insured from liability for negligence, was liable to her for the damages she sued for.

The cause removed by the defendant into the federal court, there followed a welter of pleadings and affidavits, more fully described in the opinion of the district judge.[4] By and in these, plaintiff undertook, by supplemental and amended complaints filed without leave obtained, to make an additional party, first, Gillette Safety Razor Co., and next, the Gillette Company.

The defendant Employers opposed the filing of these pleadings and the making of these parties; and each of the Gillette companies, on jurisdictional grounds, resisted being brought into the suit.

In addition, Employers filed an extended motion to dismiss the action against it.[5]

On April 11, 1952, all pending motions submitted were

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[4] Watson v. Employers Liability Assurance Co., 107 Fed. Supp. 494.

[5] Its grounds were: That under the terms of its policy it was not subject to a direct action; that to subject it to such action was to deny full faith and credit to the laws of Massachusetts and Illinois, where the policy was issued and delivered; that it would violate Secs. 1 & 10 of Art. 4 and Sec. 1, of the 14th Amendment to the Constitution of the United States and Sec. 15 of Art. four of the Constitution of La. in that such action would, (a) impair the obligation of the defendant's contract with the Toni Company, (b) deny to defendant its right to have the Courts of Louisiana and the Federal Court sitting in Louisiana give full faith and credit to the Legislative Acts and jurisprudence of the States of Massachusetts and Illinois, (c) deprive the defendant of its property and rights without due process of law, and (d) deny to defendant equal protection of the law; that Act 55 of the Louisiana Legislative Session of 1930, as amended, Sec. 14.45 of Act 195 of the Louisiana Legislative Session of 1948, Sec. 655 of Title 22 of the Louisiana Revised Statutes of 1950, and Acts 541 and 542 of the Louisiana Legislative Session of 1950, under which this proceeding is brought, do not apply under the facts of this case, or if applicable, violate the provisions of the Federal and Louisiana Constitutions referred to in Art. 7 hereof insofar as the said Acts give, or purport to give complainants herein a direct cause of action against

taken under advisement on briefs, and on September 29th, for the reasons given in his opinion, the district judge entered judgment granting the motions.

Adjudging and decreeing that Acts 541 and 542 of the Louisiana Legislative Session of 1950 were unconstitutional, null and void insofar as they attempted to invalidate or otherwise affect the "no action" clause of the policy executed and delivered by a foreign corporation in another state and valid where made, and that the action should in all respects be dismissed, the district judge entered an order dismissing it as to all the defendants.

Appealing from that judgment, the plaintiffs are here seeking its reversal. In support of their contention that the judgment may not stand, they press upon us, first, that the decision dismissing the cause as to Employers was erroneous because it is conceded, as it was in the *Bish* case, that Employers had filed a consent to be sued in a direct action required by Act 42 of 1950, as the condition of doing business in the state.

They press upon us, second, that if the dismissal was not erroneous as to Employers, it was as to the Gillette corporations because they had the right to substitute or bring the Gillettes in as new and additional parties, and that, upon the affidavits of record, they made out a showing as to the Gillette Company that it was doing business in the state and subject to be sued there.

We do not think so. As to the dismissal of the insurer, it is true that, as the extorted price of doing business in the state, it did file the written consent required by Art. 542

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defendant under the facts set forth in this motion, as evidenced by the decision of this court in the case of Bish v. The Employers Liability Assurance Corp., Ltd., 102 Fed. Supp. 343; and that the complaint herein fails to state a claim upon which relief can be granted.

This was followed by a prayer: that the motion to dismiss and plea of unconstitutionality be sustained; and that Art. 55 of the Louisiana Legislative Session of 1930 as amended, Sec. 14.45 of Act 195 of the Louisiana Legislative Session of 1948, Sec. 655 of Title 22 of the Louisiana Revised Statutes of 1950, and Acts 541 and 542 of the Louisiana Legislative Session of 1950, each be declared unconstitutional, if applicable to this proceeding, in that they violate those sections of the Federal Constitution listed in Art. 7 of this motion.

of 1950. We find ourselves, however, in complete accord with the views of the district judge that if the statute is construed as extending to and invalidating the "no action" provision of a policy written and delivered, as this one was, outside of the state, the statute represents an attempt to give extra territorial effect to Louisiana laws and to subject to them the doing of business, and the business done, in other states. So construed, we are in no doubt that, as contended by Employers and as found by the district judge, it violates defendant's constitutional rights.

This being so, it is clear that the decisions which settle it that consent to the deprivation of constitutional rights given as the extorted price of doing business in a state cannot prevent the assertion of those rights when they are challenged or sought to be denied, apply in full vigor here.

In complete accord with the reasons summed up by the district judge in his opinion[6] and with the more ex-

[6] These, as stated by him are:

"The issues involved in the motion to dismiss insurer (Employers) on the ground of the unconstitutionality of Act 541 of 1950 are the same as in Bish v. Employers' Liability Assurance Corp., Ltd., D. C., 102 F. Supp. 343, which was sustained. Nothing in the arguments has caused this court to change its views, but they have been, in effect, sustained in Fisher v. Home Indemnity Co., 5 Cir., 198 F(2) 218, by the Court of Appeals for this Circuit in its decision handed down on June 30th last. The only difference is that the suit was filed here after the change made in the State law by the Acts 541 and 542 of 1950, LSA-R.S. 22:655, and note, 22:983, subd. E, applying to all policies of insurance whether made or delivered in the State or elsewhere. The latter act compels an insurer, as a condition to doing business in this State, to consent in writing to be sued in a direct action alone upon any policy wherever written, in complete disregard of any "no action" clause. These matters were dealt with fully by this court in the case of Mayo v. Zurich General Accident & Liability Ins. Co., D.C., 106 Fed. Supp. 579. Both statutes were held to be unconstitutional insofar as they dealt with policies written and delivered outside the State of Louisiana, and that the State could not impose the compulsory consent either before or after the insurance company did business here. See also Bayard v. Traders & Gen. Ins. Co., D.C. 99 F. Supp. 343, and Bish v. Employers' Liability Assurance Corp., Ltd., D. C. 102 F. Supp. 343.

Employers will therefore be dismissesd from the case for the reasons stated in those decisions."

tended treatment accorded these reasons in the *Bish* and *Mayo* cases, *supra*, we shall not further extend this opinion by elaborating upon them. We shall, therefore, content ourselves with referring with approval to those opinions and the authorities they cite, adding to them others as set out in the appended note.[7]

As to the question whether plaintiffs could or should be allowed to bring into the action, and continue it after dismissal of the insurer as against, either the razor company or the Gillette Company, the district judge was of the opinion, and in effect held, that the dismissal of Employers had effected a dismissal of the whole suit and that it could not be continued on the docket to bring in after removal an additional defendant or defendants not made parties in the state court.

He, therefore, dismissed the action completely and as to all defendants without at all determining or even considering the other questions arising as to the service of process and whether the defendants sought to be substituted are, as claimed, doing business in Louisiana so as to give the court jurisdiction over them.

Appellee Employers points out: that the amended complaints by which plaintiffs sought to make the Gillette companies parties were filed without leave of the court; that no order has ever been issued allowing their filing; that no leave has been entered; that, in fact, the district judge sustained the objections of Employers as to the allowance of these complaints. It insists that the sole question for our decision is whether the trial judge abused his discretion in refusing to allow the amendment. It argues that not only was there no abuse of discretion but that it would have been an abuse to allow their filing.

Insisting that neither Rule 21 nor Rule 25, Federal Rules of Civil Procedure, supports appellants' claim, it points out that Rule 25, providing for the substitution of parties

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[7] Quaker City Cab Co. v. Penn., 277 U. S. 390; Terral v. Burke Construction Co., 257 U. S. 529; Frost v. R. R. Comm., 271 U. S. 583; Hanover Fire v. Carr, 272 U. S. 494; Security National v. Previtt, 202 U. S. 246; Power Mfg. Co. v. Saunders, 274 U. S. 490; Schwegman Bros. v. Board, 43 So(2) 248.

in the case of death, incompetency, transfer of interests, etc., cannot possibly apply to this case, for what was attempted here was not the substitution of a party, but, in effect, the institution of a new suit against a new party.

As to Rule 21, which provides, "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just", it quotes Moore's Federal Practice, 2nd Ed., Vol. 3, p. 2907:

> "It has been held that Rule 21 is not a substitution rule, but contemplates the retention of a party or parties when another party is added or dropped, and therefore that a sole party or defendant cannot be dropped and another added."

and cites cases in support.[8]

It, therefore, argues that the court was clearly correct in refusing to allow the supplemental and amended complaints filed by appellants and to permit them to continue with the suit by the device of recreating it by bringing into it an entirely new party.

We agree with the appellee that the permitting or refusal of amendments is a matter within the sound discretion of the court and that a rule denying an application to amend will not be disturbed on appeal unless there has been a clear abuse of discretion.

We agree, too, that there was no abuse in this case. Indeed, since the refusal to permit the filing did not in any manner prejudice plaintiffs in their right to sue the defendants separately if they were able to obtain jurisdiction of them, the district judge did not abuse, he used discretion in bringing this action to an end, leaving the controversial matters sought to be injected by the proffered amendments for another action if not another forum.

The judgment of dismissal was right. It is affirmed.

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[8] United States v. Swink, 41 Fed. Supp. 98; Schwartz v. Metropolitan Life Ins. Co., 2 FRD 167; Schwartz v. The Olympic, Inc., 74 Fed. Supp. 800; and Davis v. Cohen, 268 U. S. 68.